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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW DARYL MCPHEETERS,

Defendant and Appellant.

C081720

(Super. Ct. No. P15CRF0359)

A jury convicted defendant Matthew Daryl McPheeters of possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 1), possession of a controlled substance, to wit, methamphetamine, a misdemeanor (Health & Saf. Code, § 11377, subd. (a); count 3), driving on a suspended or revoked license, a misdemeanor (Veh. Code, § 14601.1, subd. (a); count 4), possession of a large-capacity magazine, a misdemeanor (Pen. Code, § 32310; count 8; hereafter, unless otherwise set forth, statutory references are to the Penal Code), possession of drug

paraphernalia, a misdemeanor (Health & Saf. Code, § 11364; count 9), two counts of being under the influence of a controlled substance while in possession of a loaded firearm (Health & Saf. Code, § 11550, subd. (e); counts 6 and 7), and two counts of carrying a loaded firearm in a vehicle in public, a misdemeanor (§ 25850, subd. (a); counts 2 and 10). Defendant pleaded no contest to driving an unregistered motor vehicle, an infraction. (Veh. Code, § 4000, subd. (a); count 5.)

The court granted probation for a term of five years subject to 364 days in jail.

Defendant appeals. He contends (1) insufficient evidence supports his convictions for carrying a loaded firearm in public (counts 2 and 10) and (2) possession of methamphetamine, a misdemeanor (count 3), is a necessarily included offense of possession of a controlled substance while armed with a firearm (count 1). We reject both contentions and affirm the judgment.

#### FACTS AND PROCEEDINGS

About 10:39 p.m. on July 12, 2015, El Dorado County Sheriff's Deputy Daniil Gutsu went to a shopping center to investigate a suspicious person who was trying to enter closed businesses. Deputy Gutsu saw defendant walk over to and get into the driver's seat of his truck. Detective Bryan Payne arrived and spoke to defendant who showed signs and symptoms of being under the influence of a central nervous system stimulant. When law enforcement officers searched defendant's truck, they found a bag with two glass smoking pipes with residue, a loaded operable semiautomatic rifle, three high-capacity 30-round magazines, and a flare launcher. Detective Payne testified that defendant was parked in a shopping center near a restaurant and a grocery store, close to inhabitable structures and roadways, in an unincorporated area of the county and that it was unlawful to shoot in the area.

About 5:00 a.m. on September 17, 2015, Detective Payne stopped defendant's vehicle on eastbound Highway 50 near the Shingle Springs exit for having an expired

registration. Defendant pulled over to the side of the highway. Defendant was under the influence of a central nervous system stimulant. A search of his truck revealed 1.032 grams of methamphetamine and a loaded operable shotgun. The area was an unincorporated area of the county and it was unlawful to shoot in the area and on the highway.

Defendant testified at trial and admitted that on July 12, 2015, he had driven to the shopping center near restaurants and a bank with a rifle in his truck. He claimed he had used methamphetamine but had done so prior to that day. On September 17, 2015, defendant admitted he had been driving to Red Hawk Casino with the shotgun in his truck. He was surprised methamphetamine was found in his truck but admitted he had smoked some the day before he was stopped. He claimed the detective threatened to arrest his passenger unless he took responsibility for the drugs.

## DISCUSSION

### I

#### *Sufficiency of the Evidence of Carrying a Loaded Firearm in Public*

“ ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility. [Citation.]’ ” (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) Reversal on the ground of insufficiency of the evidence “is unwarranted unless it

appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 25850, subdivision (a) provides: “A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.”

A public road or highway is a public place as is the parking lot of a shopping center. (See *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401-1402 [“ ‘[t]he term “public place” generally means “a location readily accessible to all those who wish to go there” ’ ”]; see also *People v. Vega* (1971) 18 Cal.App.3d 954, 958 [“[t]he parking lot of a market, being accessible to members of the public having business with the market, is a public place for purposes of section 12031 of the Penal Code”].)

Section 17030 defines a “ ‘prohibited area’ ” as “any place where it is unlawful to discharge a weapon.” Section 374c provides: “Every person who shoots any firearm from or upon a public road or highway is guilty of a misdemeanor.”

To prove that defendant violated section 25850, subdivision (a), the prosecutor was required to prove (1) defendant carried a loaded firearm in his vehicle; (2) defendant knew he was carrying a firearm; and (3) defendant was in “a public place or on a public street in an unincorporated area where it [is] unlawful to discharge a firearm.” (§ 25850, subd. (a); CALCRIM No. 2530.)

Defendant only challenges the evidence supporting the last element. Relying upon the statutory interpretation of former section 12031 in *People v. Knight* (2004) 121 Cal.App.4th 1568 (*Knight*), defendant complains that there was no evidence that a local ordinance or other law prohibited his “possession” of a firearm in the unincorporated areas where he was found.

In *Knight*, this court held the plain meaning of former section 12031 “prohibits carrying a loaded firearm on one’s person or in a vehicle: (1) while in any public place in

an incorporated city; (2) while on any public street in an incorporated city; (3) while in any public place in a prohibited area of unincorporated territory; or (4) while on any public street in a prohibited area of unincorporated territory.” (*Knight, supra*, 121 Cal.App.4th at p. 1576.) *Knight* determined that the trial court erred in denying the defendant’s motion to suppress because the prosecution failed to establish that the defendant’s arrest was lawful, that is, “that the officers had reasonable cause to believe [the] defendant had committed a felony” in that there was no evidence that the “encounter occurred in an incorporated city or a prohibited area of an unincorporated territory.” (*Ibid.*) The trial court “erroneously adopted the prosecutor’s position that section 12031 prohibit[ed] carrying a loaded weapon in *any* public place.” (*Id.* at p. 1575.)

*Knight* is distinguishable. Here, Detective Payne testified that both contacts occurred in unincorporated areas of the county and that it was unlawful to discharge a firearm in both locations. In July, defendant carried a loaded rifle in his truck, which he had driven to the shopping center. Detective Payne testified it was unlawful to discharge a firearm in the area because it was too close to inhabited structures and roadways. In September, defendant carried a loaded shotgun in his truck while driving on Highway 50 near the Shingle Springs exit. Detective Payne testified it was unlawful to discharge a firearm on the highway or from or across the highway.

Contrary to defendant’s claim, the specific ordinance or other law prohibiting his possession where he was found is not a required element of the offense. (§ 25850, subd. (a); CALCRIM No. 2530.) Defendant was free to present evidence contrary to Detective Payne’s testimony that it was unlawful to discharge a firearm in the areas where defendant was carrying the loaded firearms. Unless rebutted, Detective Payne’s testimony that the law prohibited a person from shooting any firearm from or upon a public road or highway, (§ 374c) alone was sufficient to show that defendant was in “a public place or on a public street in an unincorporated area where it is unlawful to discharge a firearm.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Moreover,

defendant's testimony supported the conclusion that he had been carrying the loaded firearms while driving on the road to the shopping center in July and the highway in September. Sufficient evidence supports defendant's convictions on both counts 2 and 10.

## II

### *Lesser Included Offense*

Defendant contends possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 3) is a lesser included offense of possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 1). Defendant argues count 3 is a lesser offense of count 1 under the accusatory test where, as here, the prosecutor alleged possession of methamphetamine, not a controlled substance. We reject defendant's contention.

“The statutory elements test does not depend on which statute covers the broader range of conduct. Rather, we ask if the greater offense cannot be committed without also committing the lesser offense. *In answering that question, we do not consider the underlying facts of the case or the language of the accusatory pleading.*” (*People v. Sanders* (2012) 55 Cal.4th 731, 739; italics added.)

“Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but *only the statutory elements in deciding whether a defendant may be convicted of multiple charged crimes.*” (*People v. Reed* (2006) 38 Cal.4th 1224, 1231; italics added.)

Here, “the only test for determining whether a defendant may be convicted of multiple charged crimes is the statutory elements test.” (*People v. Williams* (2009) 170 Cal.App.4th 587, 644.) “Under the statutory elements test, a violation of Health and Safety Code section 11377, subdivision (a) is not a lesser included offense of a violation

of Health and Safety Code section 11370.1.” (*Id.* at p. 645.) *Williams* reasoned that Health and Safety Code section 11370.1 set forth a different list of controlled substances than those listed in Health and Safety Code section 11377; 11370.1 could be violated based on substances not included in 11377; thus, 11370.1 could be violated without necessarily violating 11377. (*Williams*, at pp. 644-645.) We agree with *Williams* and reject defendant’s contention.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_HULL\_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_BUTZ\_\_\_\_\_, J.

\_\_\_\_\_MAURO\_\_\_\_\_, J.